

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TED EARL ASH)	
Claimant)	
VS.)	
)	Docket No. 259,884
BRADBURN WRECKING COMPANY, INC.)	
Respondent)	
AND)	
)	
CALIFORNIA COMPENSATION INS. CO. and/or)	
WESTERN GUARANTY FUND)	
Insurance Carrier)	

ORDER

The respondent and its insurance carrier request review of the preliminary hearing Order entered by Administrative Law Judge John D. Clark on November 28, 2000.¹

ISSUES

The specific issues listed by respondent and its insurance carrier in their Application for Review by Board of Appeals are:

- (1) The Administrative Law Judge erred in finding that the relationship of employer/employee existed between Bradburn Wrecking Co., Inc. and Ted Ash on the date of the accident in question.
- (2) The Administrative Law Judge erred in finding that claimant was injured out of and in the course of his employment with Bradburn Wrecking Co., Inc.
- (3) The Administrative Law Judge erred in finding that Bradburn Wrecking Co., Inc. received proper notice of claimant's alleged injury.

But the Appeal Brief of Respondent and Insurance Carrier only mentions notice of accident or injury as a defense to this claim for compensation. Respondent also contends

¹ The ALJ's Order shows California Compensation Co. Inc. as the insurance carrier, but the Appeal Brief of Respondent and Insurance Carrier states that respondent's insurance carrier is Western Guaranty Fund. The Division's records, however, show California Compensation Co. Inc. as the respondent's insurance carrier.

that it did not receive notice of the preliminary hearing, but respondent does not make that an issue for review by the Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Only claimant and his attorney were present at the November 28, 2000 preliminary hearing before Judge Clark. Claimant testified about being injured at work on August 13, 1999 and stated that he was employed by Bradburn Wrecking Company on that date.

A. I was cutting a tree and a – another guy that was grinding stumps on the job was coming up and pulling a rope and putting too much stress on the tree and it made it peel up and pop back and come back and hit me in the head and smash me against a steel pole that was on the property.

Q. Did you fall to the ground also?

A. I had a safety that was holding me.

Q. Did you obtain medical treatment?

A. Yes.

Q. Who did you see?

A. I went to the hospital at St. Joseph.

Q. Did you see a doctor, is it Gagnon?

A. Yes. After the hospital I went to Dr. Gagnon and he straightened my nose up.

. . .

Q. Did you have some dental work done as well?

A. Oh, yes, I did. I had two impacted teeth over here on the side that was hit that I had to have removed.

Q. What was the injury?

A. My broken nose and fractured cheek bone and a black eye. And I had a laceration from about three or four inches long.

Q. Any other injuries?

A. My neck and my back has been hurting ever since.²

Based upon his uncontroverted testimony, Judge Clark found claimant was an employee of respondent on the date of accident and that claimant's injury arose out of and in the course of his employment with respondent. The Board agrees.

Respondent also argues that Judge Clark's Order should be reversed and benefits denied because claimant failed to prove that he provided respondent with timely notice of the accidental injury. Respondent, in its brief, points out that "lack of notice is an affirmative defense to a claim for compensation pursuant to the provisions of K.S.A. 44-520." The ALJ may have inferred from the claimant's testimony about the circumstances surrounding the accident, the obvious nature of claimant's injuries and his immediately seeking medical treatment, that respondent had actual knowledge of the accident or else would have most likely received notice immediately thereafter. Nevertheless, claimant was not asked if a supervisor witnessed his accident, if the medical treatment was authorized or if he gave notice to his employer. But an issue as to timely notice of the accident was not raised at the November 28, 2000 hearing. The Board finds that this issue should not be raised for the first time on appeal.

K.S.A. 44-534a gives an administrative law judge authority to conduct a preliminary hearing which shall be summary in nature and ". . . [u]pon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation" K.S.A. 44-534a(a)(2) also provides that preliminary hearing findings are not binding but are instead subject to modification upon a full hearing on the claim. Furthermore, any party may request a preliminary hearing and there is no limit to the number of preliminary hearings that may be held in a case.

Claimant's entitlement to compensation was not disputed at the hearing. Therefore, the Order of the ALJ finding "Claimant was injured out of and in the course of his employment with the Respondent on August 13, 2000," authorizing a treating physician and ordering payment of medical expenses by respondent and its insurance carrier should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge John D. Clark dated November 28, 2000 should be, and is hereby, affirmed.

² Preliminary Hearing at 5-6.

IT IS SO ORDERED.

Dated this ____ day of March 2001.

BOARD MEMBER

c: Robert E. Shaver, Wichita, KS
Ronald J. Laskowski, Topeka, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director